IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 51 of 2006
with
CIVIL APPLICATION No. 3292 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ANTIFRICTION BEARINGS CORP. LTD. (ABC LTD.) - Appellant(s)
Versus
TARUN K.BANKAR - Defendant(s)

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Appearance :
MR KM PATEL for Appellant
MR NR SHAHANI for Respondent

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 06/09/2006

ORAL JUDGMENT

1. Heard Mr. K.M. Patel, learned counsel for the appellant and Mr. N.R. Sahani, learned counsel for the respondent.
2. The appellant being aggrieved by the judgment and decree dated 31.12.05 passed in Regular Civil Appeal No. 55/01 by the learned Fast Track Court No.7, Bharuch, reversing the judgment and decree dated 29.9.2001 passed by the learned Civil Judge [Senior Division], Bharuch in Regular Civil Suit No. 592/96 is before this Court.
3. The short facts necessary for disposal of the present appeal are that, the respondent-plaintiff was appointed as Trainee Engineer in 1989 with the appellant-company. The probation period was reduced to three months and he was appointed and shifted as Engineer in 1990 in the Assembly Department, where, one Mr. Mukesh Thakkar was Incharge of the department. It is the case of the respondent-plaintiff that Mr. Mukesh Thakkar was bearing some ill-will against the plaintiff and was harassing him unnecessarily. The plaintiff was asked not to

work, he was not given any work and he was required to sit in the Time Keeper's office for a period of 35 days. Apart from these allegations, it was also submitted that Mr. Thakkar was finding excuses to insult and condemn the plaintiff as an incompetent person. The plaintiff made certain complaints of the facts to various persons, but they proved futile.

4. On 20th April, 1996, the plaintiff, narrating the entire history and also referring to the conduct of Mr. Mukesh Thakkar and the harassment extended by him to the plaintiff, tendered a resignation to Mr. Mukesh Thakkar himself. Mr. Mukesh Thakkar refused to accept the said resignation. It appears that thereafter, the present plaintiff submitted his second resignation on 3rd May, 1996 to one Ramsinh Parmar, submitting inter alia, that under the compelling circumstances and looking to the conduct of Mr. Mukesh Thakkar, he was unable to continue with the work, he had tendered his resignation earlier on 20th April, 1996 which was

not accepted and under the circumstances, the resignation be accepted. It appears that the appointing authority accepted the resignation and directed that the respondent-plaintiff be relieved with effect from 31.5.96.

5. After the plaintiff was relieved, it appears that he became more wise and vigilant and filed the suit before the trial court, submitting inter alia, that apart from the reasons stated in his resignation letters, Mr. Ramsinh Parmar had also persuaded him to submit resignation letter to create pressure upon Mr. Mukesh Thakkar and virtually fraud was played upon him. According to him, both the resignation letters were result of the fraud played upon the plaintiff and a conspiracy was hatched by Mr. Ramsinh Parmar in connivance with Mr. Mukesh Thakkar. It was submitted that as the resignation was obtained by playing fraud, it be declared to be null and void and it be further directed that the plaintiff continues in service with the defendant establishment.

6. The defendant, after putting in appearance

submitted that the resignations were voluntary, the plaintiff was never persuaded by anybody to tender the resignation and in any case, the suit for such declaration and reinstatement would not be maintainable.

7. The learned trial court, after casting issues recorded evidence of the parties and after giving due opportunity of hearing, dismissed the suit. The plaintiff, being aggrieved by the said judgment and decree, preferred Regular Civil Appeal, which came to be allowed, therefore, the defendant-establishment is before this Court under Section 100 of the Code of Civil Procedure.

8. The appeal came to be admitted on 20.3.06 by the learned Single Judge on the following substantial questions of law.

    1. Has not the Appellate Court committed an error of jurisdiction in granting specific performance of the contract of personal service by ordering reinstatement of the respondent in service with further direction

requiring the appellant to permit the respondent to perform his duties and pay him all back wages, perks and benefits, allowances and increments etc?

2. Is not the decree of full back-wages liable to be set aside in view of the judgment of Hon'ble Supreme Court in the case of U.P. Brossware Corporation Ltd. v. Uday Narayan Pande, reported in [2006] 1 SCC 71 in which it is held that full back-wages is not an automatic consequence of order of termination being held illegal and that is for the employee to plead and prove that he is unemployed?

3. Has not the appellate court exceeded jurisdiction in allowing appeal wherein law of two views are possible, the appellate court cannot substitute its view for that of Trial Court?

9. Mr. K.M. Patel, learned counsel for the appellant, after taking me through the findings recorded by the two courts and the language in which both the resignations have been couched,

submits that the resignations were voluntary and in any case, if the resignations were not withdrawn, the appellant was not to wait indefinitely in accepting the resignation. It was also submitted by him that the findings recorded by the first appellate court in not accepting the findings of the learned trial court are not only perverse, but run contrary to the basic provisions of law. He submits that the learned first appellate court was unnecessarily influenced by the fact that Mr. Mukesh Thakkar was not examined, according to him, the allegations of conspiracy were against Mr.Ramsinh Parmar, who was examined as a witness. He also submits that in a case like present, where services of an employee are terminated on his voluntary resignation, the suit had to be dismissed and in any case, a decree for reinstatement could not be granted contrary to the provisions of the Specific Relief Act.

10. Mr. Shahani, learned counsel for the respondent-plaintiff, on the other hand, submits that the

facts would clearly speak for themselves, the plaintiff was unnecessarily harassed, his resignation was not accepted by Mr. Mukesh Thakkar and as the plaintiff was persuaded by Mr. Ramsinh Parmar to tender resignation to create pressure upon Mr. Mukesh Thakkar, the plaintiff had submitted resignation as a result of fraud played upon the plaintiff, it was illegally accepted. He also submits that if the Court is of the opinion that a decree for reinstatement cannot be granted in favour of the plaintiff, then, the judgments and decrees passed by the two courts below be set aside and the matter be remitted back to the trial court with liberty in favour of the plaintiff to amend the pleadings and claim damages.

11. Contending contrary to these submissions, Mr. Patel submits that present is a case where amendment now cannot be allowed, because, claim for damages as on today would be barred by limitation and if that is the legal position, then, amendment to incorporate a relief which stands barred by limitation cannot be allowed.

12. I have heard the parties at length. The learned first appellate court has referred to various arguments raised by the parties. In para-17 of its judgment, it has observed that; as the resignation was not unconditional and was not free from pressures or was unvoluntary, it could not be relied upon. For coming to such conclusion, it has referred to the context of the resignation, the history and the treatment extended by Mr. Mukesh Thakkar to the plaintiff. Without discussing anything further, the Court has simply observed that the plaintiff had submitted the resignation placing reliance upon the assurance of the officer therefore, this was no resignation in its true sense and it was never intended to be a resignation in real sense. The learned first appellate court, without appreciating the legal position, simply observed that the resignation was absolutely unvoluntary or was result of a fraud played.

13. It is also to be noted that the first appellate court has observed that non-examination of Mr. Mukesh Thakkar and Mr. Shah who were continuing

in service with the defendant would speak against the interest and conduct of the defendant. The Court went on observing that even if the burden to prove a particular fact was not on a particular party, but if the party withholds or suppresses an evidence available with it, then, adverse inference can be drawn against such party. In the opinion of this Court, the learned first appellate court did not properly appreciate the facts and the legal position. The allegation of harassment were against Mr. Mukesh Thakkar, there were no allegations of ill-treatment or harassment against Mr. Ramsinh Parmar. The allegations of fraud were against Ramsinh Parmar and not against Mr. Mukesh Thakkar. It appears that the learned appellate court presumed that there was a conspiracy between Mr. Mukesh Thakkar and Mr. Ramsinh Parmar and Mr.Ramsinh Parmar asked the plaintiff to tender resignation. Mr. Ramsinh Parmar has been examined and he has clearly denied the allegation that he required the plaintiff to submit the resignation.

14.It is also to be seen that the first resignation was submitted on 20th April, 1996 and was tendered to Mr. Mukesh Thakkar, who, in his turn, refused to receive the same. If the plaintiff wanted to create pressure upon Mr. Thakkar or satisfy ego of Mr. Mukesh Thakkar, then, the matter would have come to an end on tendering the first resignation which was not accepted by Mr. Mukesh Thakkar, but the plaintiff submitted the second resignation letter almost after about 13 days of the first refusal. In the second resignation letter, he repeated his entire history and also submitted that the first resignation was tendered to Mr. Mukesh Thakkar, who refused to receive it, therefore, the second resignation was being tendered to Mr. Ramsinh Parmar. The submission of the second resignation by the plaintiff cannot be said to be result of any fraud, because, the plaintiff himself does not say that after the refusal on the part of Mr. Mukesh Thakkar to accept the resignation, he was called by Mr. Ramsinh Parmar to submit yet another resignation letter. The second

resignation letter was absolutely voluntary and was in clear terms informing Mr. Ramsinh Parmar that for the reasons stated in the resignation letter, the plaintiff was not ready to continue in the services. The learned first appellate court has also observed that the defendant has not given out the reasons as to why the resignation letter was kept pending at least for a period of one month. It is to be seen that the resignation letter was submitted 3rd May, 1996 and an order was passed that the plaintiff would stand relieved with effect from 31.5.96. If within 28 days, the resignation is accepted, then, it cannot be said that there was unexplained delay. If the resignation letter dated 3rd May, 1996 was accepted within a short while, the plaintiff could still come to the Court and say and it was accepted in hurry and the aim was to throw the plaintiff out.

15. The learned first appellate court has also observed that it was known to anybody that who was competent authority to accept the resignation and issue order of relieving. This

was not a question in issue. The case of the plaintiff was that the resignation was obtained after playing fraud. It is not the case of the plaintiff that the order of removal has been passed by a person who was not a competent authority. The learned first appellate court has also observed that the respondent company had not produced any concrete documentary evidence to convince the court that it had followed the proper procedure in accepting the said resignation. I am shocked to read this finding. Basic burden to prove that, some procedure was to be followed, would be on a person who comes to the Court and says that the basic procedure was not followed. In the instant case, the learned first appellate court has put the cart before the horse and shifted the entire burden on the shoulders of the defendant to prove that they had followed the procedure. If there was no allegation that proper procedure was not followed, then, it was not expected of the defendant that they would enlarge the scope of the inquiry and prove to the satisfaction of the

court that such procedure was followed.

16. The learned first appellate court has also observed that the defendant company did not produce the relieving letter on records to show that the appellant-plaintiff was relieved from his services. Issuance of a relieving letter would only be a technical requirement, but an endorsement made on the resignation letter dated 3.5.96 would clinch the issue when it reads that the plaintiff would stand relieved with effect from 31.5.96.

17. The learned first appellate court had also observed that the respondent-defendant company had accepted the resignation without due or proper consideration of the matter in right perspective. I am unable to understand the logic behind this finding. In a matter between master and servant, the servant comes and says that for reasons stated in the resignation, he does not wish to continue in service. If such letter is accepted in its true perspective in view of the language employed in the letter, then, that would be the end of the matter. I am unable to

understand that what was the meaning of the words “true perspective” or “right perspective” employed by the first appellate court. It is also to be seen that service contract cannot be specifically enforced. In the present matter, by grant of the decree, the appellate court is compelling the defendant to specifically enforce the agreement of service/contract of service.

18. So far as the submission of Mr. Sahani that he be allowed to claim damages is concerned, I must immediately observe that a suit for recovery of damages can be filed within a period of one year only and in the present case, cause of action accrued to the plaintiff on 31.5.96. If the suit for recovery of damages is filed today, it would be hopelessly barred by time. Mr. Shahani submits that the amendment, if is allowed, it would relate back to the date of the suit. The proposition in its generality is right, but in the exceptional circumstances, it cannot be accepted. In some case, amendment may relate back to the suit, but in other cases, where limitation has expired and the proposed

plaintiff would not be entitled to file a suit on the date of the amendment application on the strength of the original cause of action, then, such amendment cannot be allowed and on basis of such amendment, even a decree cannot be granted.

19. Taking into consideration the totality of the circumstances, I must hold that the lower appellate court committed error of jurisdiction in granting specific performance of the contract of personal service by ordering reinstatement of the respondent and in granting consequential benefits. As the first question is being answered against the interest of the respondent-plaintiff, the other two questions on which the appeal has been admitted are not required to be answered. The appeal deserves to and is accordingly allowed. The suit filed by the plaintiff is dismissed. No costs. As the appeal is being finally disposed of, Civil Application No. 3292/06 stands disposed of.

[R.S. GARG, J.]

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